Recent Legislation, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

Publisher's Note: This is the updated, corrected version of Wendy Samuelson's column. The text appearing in the original print version of the publication was included in error. NYSBA apologizes to readers for this oversight.

Recent Legislation

Tax Cuts and Jobs Act

As a reminder, and as more fully reported in my last column, the Tax Cuts and Jobs Act (TCJA) abolished the maintenance payor's ability to deduct maintenance payments from the payor's taxable income, and the recipient spouse is no longer required to pay taxes on the maintenance award. However, New York State still permits the maintenance payor to deduct maintenance from the payor's taxable income. Agreements between divorcing parties executed after December 31, 2018 are impacted by the new federal tax law. If a divorce agreement was executed prior to December 31, 2018, and modified after that date, TCJA will not apply unless the agreement specifically states that it will apply. Therefore, when drafting any modification agreement, it should specifically state whether the TCJA will or will not apply, and whether maintenance will be taxable or not.

The TCJA also includes a new child tax credit, which replaces the old model of taking children as exemptions on tax returns. The new Child Tax Credit is $2,000 per child until age 17, which phases out for income over $200,000 as a single filer, and $400,000 for joint filers. The refundable portion of the credit is limited to $1,400, which amount will be adjusted for inflation after 2018. The new Child Tax Credit is set to expire after December 31, 2025, so it is important to include language regarding both child tax credits and dependency exemptions in settlement agreements.

Be mindful that the person who claims the child as the dependent can also take the child care tax credit of $600 per child until age 13 and the college tuition tax credit of up to $2,500 per child.

NYC Deferred Comp Plan Policy Changes

Effective March 2019, the New York City Deferred Compensation Plan has changed its policy regarding the language acceptable for the division of retirement benefits pursuant to a Domestic Relations Order.

The plan will no longer allow the division between two dates nor the division as of a specific date. The *Majauskas* formula has never been allowed (as with New York State Deferred Compensation Plan). Further, the plan will no longer calculate post-commencement gains and/or losses, nor take into account loans. In July 2011, New York State Deferred Compensation Plan also stopped calculating post-commencement gains and/or losses.

The plan will only accept a fixed-dollar amount or a percentage of the account as of the date the plan establishes an account for the former spouse.

Essentially, the plan will no longer determine the marital share of the plan accounts by allowing the division as of a specific date. In order to accomplish some of the typical methods of division, one particular QDRO

Wendy B. Samuelson is a partner of the boutique matrimonial and family law firm Samuelson Hause & Samuelson, LLP, located in Garden City, New York. She has written literature and lectured for various law and accounting firms and organizations. Ms. Samuelson is listed in The Best Lawyers in America, "The Ten Leaders in Matrimonial Law of Long Island," and a top New York matrimonial attorney in Super Lawyers. She has an AV rating from Martindale Hubbell. The firm is listed as a Top Tier Matrimonial Law firm by *U.S. News & World Report*. Ms. Samuelson welcomes your feedback at (516) 294 6666 or WSamuelson@SamuelsonHause.net. The firm's website is www.SamuelsonHause.net.

A special thanks to Joshua Kors, Esq. for his assistance in writing this article, and to Tracy Hawkes, Esq. for her editorial assistance. A special thanks also to Thomas Treacy of QDRO Advisors, Inc. for his assistance in the QDRO section of this article, and Louis DeMars, CPA of AVM DeMars CPA, P.C.

expert recommends the following.:Obtain a statement for the cutoff date to be used and use the value on this date. If there are any pre-marital account balances, the parties will have to determine the amount. Calculating pre-marital account gains and/or losses has always been the responsibility of the parties. If post-commencement gains and/or losses are to be factored in, there are several methods that can be employed, including the application of a simple interest rate, average rate of return, tracing method and the proportionate method. You should consult with a QDRO expert for more information.

Recent Cases

Maintenance

A Strict Application of the Maintenance Guidelines Is Unjust in Light of the New Tax Law

Wisseman v. Wisseman, 2019 NY Slip Op. 29092[U] (Sup Ct. Dutchess County 2019)

The new federal tax law, The Tax Cuts and Jobs Act, effective January 1, 2019, ended the payor's ability to deduct maintenance payments from his income and the requirement for the recipient to include maintenance as taxable income. The new law is throwing a curve ball to courts, as they decide whether a strict application of the standard maintenance guidelines are still just and appropriate.

The Dutchess County Supreme Court tackled that issue head-on in this case. The couple were married for 13 years and had two children. The wife was a paralegal earning $30,000 per year, and the husband was a highway superintendent earning $70,800 per year. The parties had resolved almost all of their issues, including the duration of maintenance, which they agreed to set at two years, but they failed to resolve the amount of maintenance.

The parties stipulated that, given their annual incomes, a strict application of the statutory guideline (DRL § 236B(6)) would equal $512.54 per month in maintenance. But, the husband argued that due to the new federal tax law, he would now be paying more tax and would have less income at his disposal than originally considered when New York crafted its maintenance guidelines. He claimed that since he was in the 22% tax bracket, his maintenance should be reduced by 22%. The wife argued that the strict application of the statutory formula is mandated, and that a reduction of her award by 22% would result in even less of a net payment to her than would have resulted if she had to claim the maintenance as taxable income, since she was only in the 12% tax bracket.

The trial court declared that, due to the new federal tax law, a "strict application of the maintenance guidelines would be unjust and inappropriate so as to warrant a deviation" and ordered the husband's maintenance payments be set at $451.04 per month, 12% lower than the statutory guidelines amount, which is the amount that the wife would have had to pay in taxes pursuant to the old tax law. The court commented that "(u)ntil this court is guided by a higher authority or legislative change, it finds that such deviation under these circumstances is just and proper."

It is interesting to note that in this case, the court lowered the support award by the recipient's tax bracket based on what she would pay in taxes under the law rather than the payor's tax bracket. It appears that the best approach is still to review the net cash flow of both parties when determining whether to deviate from the formula.

Child Support

A Parent's Voluntary Contributions to Household Expenses Are Imputed as Income and Are Not a Reason to Deviate from the CSSA Formula

Matter of Weissbach v. Weissbach, 169 AD3d 702 (2d Dep't 2019)

The mother petitioned the family court for child support for the parties' three children and an award of educational expenses for the children's private schools.

The father claimed he earned less than $10,000 per year from his auto body shop. The mother earned approximately $27,000 a year as a medical assistant The court imputed approximately $20,000 per year to the father above his claimed income. After determining the child support based on the CSSA, the court determined that it would be unjust or inappropriate for the father to pay the support based on the formula since the father was already paying the mother and children's household expenses, which totaled approximately $70,000 per year, and therefore reduced his support obligation to $25 per week. The court also denied the mother's petition for private school expenses.

The appellate division reversed both rulings. The court should have imputed $70,000 per year above the father's claimed income from his auto body shop, because for the past 10 years, he had contributed that amount to the mother and children's household expenses from sums he inherited and the father had "substantial" assets (although the case does not state how much). In addition, "the father's voluntary contributions to household expenses do not further a basis to depart from the Child Support Standards Act calculations (see Family Ct. Act § 413[1][f]). Such voluntary payments constitute, at most, an unenforceable promise to pay."

Regarding private school expenses, the lower court failed to properly consider that the children were already

enrolled in private school with the father's approval, and the father was capable of supporting himself even after contributing to their private education. Therefore, the father was directed to pay his *pro rata* share of the educational expenses.

The Court May Modify Child Support Absent a Showing of Substantial Change in Circumstances, Where the Parties Did Not Opt Out of FCA 451

***Matter of Calta v. Hoagland*, 167 A.D.3d 598 (2d Dep't 2018)**

The parties' stipulation of settlement, which was incorporated into their divorce judgment, provided for child support and did not opt out of the modification statute of FCA 451 (i.e., the passage of three years or 15% increase or decrease of income). After 3.5 years had past since the agreement was signed, and both parties' incomes had increased more than 15%, the mother petitioned the Family Court for an upward modification of the father's child support obligation, without showing a substantial change in circumstances. The court modified the child support obligation, and the appellate court affirmed.

Child Custody

Former Same-Sex Domestic Partner Has Standing for Custody and Visitation Based on Equitable Estoppel

***Matter of Chimienti v. Perperis*, 2019 Slip Op. 02866[U] (2d Dep't 2019)**

The wide array of reproductive alternatives now available has expanded our options in creating a family. Recently, courts have sought to clarify parental identities via equitable estoppel, solidifying the roles that same-sex partners held at the start of the subject child's life.

In this case, Perperis conceived two children via artificial insemination while the parties were in a domestic partnership. Subsequently, the parties broke up. To clarify their roles and rights, the parties entered into a consent order in which they agreed to share joint custody of the children, with physical custody and final decision-making power to Perperis and a parenting time schedule to Chimienti.

But Perperis' satisfaction with the consent order disintegrated, and she challenged Chimienti's standing to seek custody of and visitation with the children. The family court applied an equitable estoppel analysis, and determined that Chimienti had standing to seek custody and visitation. The Second Department affirmed.

The Second Department held that *Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016) expressly left open the issue of whether, in the absence of a preconception agreement, a former same-sex, non-biological, non-adoptive partner of a biological parent could establish standing based upon equitable estoppel. Equitable estoppel is properly applied to protect a child's established relationship with another who has assumed the parental role and to protect the status interest of the child in an already recognized parent-child relationship.

Here, equitable estoppel was appropriate where there was a consent order that granted Chimienti custody and parenting time and because of Chimienti's ongoing parental engagement with the children, from aiding Perperis with prenatal care and staying with her in the hospital after the children's births, to co-parenting the children and being regarded by the older child as "Mommy." To eliminate Chimienti's rights after she solidified that parental bond with the children would be "detrimental to the children's best interests.

Equitable Distribution

Hiring Domestic Help Doesn't Indicate a Failure to Contribute Equally to a Marriage

***Flom v. Flom*, 2019 N.Y. Slip Op. 01643[U] (1st Dep't 2019)**

The parties were married 18 years, had two children, and accumulated tremendous wealth. The husband was a vastly successful breadwinner. The wife was a stay-at-home mother who hired domestic help. There was no evidence that the wife "ever cooked a meal, dusted a table or mopped a floor." The court granted 60% of the marital assets to the husband and 40% to the wife based on the court's perceived inequitable contributions to the marriage.

The wife appealed, and the First Department reversed and awarded each party 50% of the marital assets. The court determined that the wife was an active mother, continuously engaged in familial responsibilities. While the wife hired a cleaning staff and didn't engage in the family's business, she coached the children's sports teams, routinely attended parent-teacher conferences, managed the household, and paid the family's finances from a joint bank account. Simply because the wife hired domestic help does not warrant a lesser award.

The wife had not worked outside of the home in 20 years. The trial court properly awarded her 6 years of maintenance at $26,000 per month based on the parties' lavish lifestyle. It was error to impute $50,000 per year of income to the wife, since the court had no basis to do so. The monthly child support based on an income cap of $141,000 (which was the income cap at the time of trial) was inappropriate given the children's lifestyle, and the appellate court used a cap of $300,000 to satisfy the children's actual needs and luxurious lifestyle.

Stipulations

Anti-Alienation Provision of ERISA Pension Can Be Waived by Stipulation

Schatz v. Feliciano-Schatz, 170 AD3d 766 (2d Dep't 2019)

In 1998, Alysius Schatz divorced his first wife, the plaintiff in this case. Six years later he married the defendant. Two years thereafter, Aloysius retired and began receiving benefits from his retirement plan. He selected a joint and survivor annuity, with the defendant, his new wife, named as the joint annuitant. Soon thereafter, Aloysius and the defendant divorced.

As part of the divorce, Aloysius and the defendant executed a stipulation of settlement. Later, they amended that settlement, providing that both parties waived their rights to each other's retirement plans, and that in the event that either party received payments in contravention of the agreement, the benefits would be turned over to a beneficiary designated by each party or to the deceased party's estate. The defendant remained the only beneficiary named in his retirement plan.

In May 2013, Aloysius remarried his first wife, the plaintiff in this case. Nine days later, he died. Since the defendant was the only named beneficiary, the decedent's retirement was paid out to her. The wife and the administrator of the decedent's estate joined forces and sued the former wife, claiming breach of contract and unjust enrichment for failing to turn over the retirement benefits, and sought summary judgment, based on the clear language of the amended stipulation.

The court denied the plaintiffs' motion, asserting that "once they are paid to the beneficiary, the funds are no longer entitled to protection" *(see Matter of Christie*, 152 A.D.3d at 767).

The Second Department reversed. It clarified that the heart of the matter is not the timing of the disbursement of retirement funds, but rather the voluntary and explicit waiver. At bar, the defendant clearly and voluntarily waived her entitlement to the decedent's retirement benefits, and therefore the plaintiffs' motion for summary judgment should have been granted.

Counsel Fees

Unmarried Parent Is Entitled to Interim Counsel Fee Award in Custody Case Pursuant to DRL 237(b)

Balber v. Zealand, 169 A.D.3d 600 (1st Dep't 2019)

As the petitioner-father and respondent-mother prepared themselves for a custody case, the mother, the lesser-monied spouse, sought to arm herself for the battle with sufficient legal funds. Citing DRL § 237(b) ("Counsel fees and expenses"), she motioned the court for $225,000 in legal fees and was granted $120,000.

The petitioner-father appealed, claiming that the DRL contemplates *pendente lite* counsel fees for a "spouse" in need of legal funds, not for an unmarried parent

The First Department denied the appeal. DRL § 237 contemplates an award of legal fees to a spouse or parent, and there is a significant body of case law in which the court has granted *pendente lite* counsel fees to unmarried parents in custody disputes (*see Matter of Brookelyn M. v. Christopher M.*, 161 A.D.3d 662 [1st Dep't 2018]; *Matter of Renee P.-F. v. Frank G.*, 161 A.D.3d 1163 [2d Dep't 2018]; *Evgeny F. v. Inessa B.*, 127 A.D.3d 617 [1st Dep't 2015]).

As the appellate court noted, the lower court considered the father's arguments that the mother unscrupulously protracted the legal battle and intensified her need for legal funds by serving useless subpoenas that were unlikely to result in relevant discovery, reporting unfounded allegations of mistreatment to the Administration for Children's Services, failing to report her diamond engagement ring as an asset on her net worth statement, and failing to disclose her new job offer to the court. The court took those facts in consideration when only awarding the mother 53% of the legal fees requested.